Editor's note: 90 I.D. 496

DONALD ST. CLAIR ET AL.

IBLA 83-626; IBSMA 82-33 Decided November 30, 1983

Appeal from a decision by the Director of the Office of Surface Mining Reclamation and Enforcement (OSM) denying appellants' requests (1) that OSM take enforcement action against a West Virginia surface coal mining operation pursuant to its oversight role under 30 CFR 842.11; and (2) that OSM conduct, as authorized by 30 CFR 733.12, an investigation into the West Virginia Department of Natural Resources' administration of its surface mining and reclamation program.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Appeals: Generally--Surface Mining Control and Reclamation Act of 1977: State Program: Generally

   Except for decisions on citizens' complaints, to which a different rule applies, an OSM State Director's decision is appealable to the Board under 43 CFR 4.1281 only if the decision states the right of appeal.

2. Surface Mining Control and Reclamation Act of 1977: Inspections: Generally--Surface Mining Control and Reclamation Act of 1977: Public Health and Safety: Imminent Danger--Surface Mining Control and Reclamation Act of 1977: State Program: Generally

   Where a State has acquired primacy over the regulation of surface mining operations within the State, OSM is

> required to conduct an immediate Federal inspection on the basis of a citizens' complaint under 30 CFR 842.11(b)(1) only if the person requesting the inspection provides adequate proof that an imminent danger exists and that the State regulatory authority has failed to take appropriate action.

APPEARANCES: Mark Squillace, Esq., Washington, D.C., for appellants; Gregory R. Gorrell, Esq., and Laura E. Beverage, Esq., Charleston, West Virginia, for intervenor; John Woodrum, Esq., Field Solicitor, Charleston, West Virginia, Glenda R. Hudson, Esq., and Walton D. Morris, Jr., Esq., Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Factual and Procedural Background

Donald and Louise St. Clair and Ella Jane Moore, appellants herein, 1/ are residents of Mingo County, West Virginia, who live within the Ragland Public Service District. Island Creek Coal Company (Island Creek), the intervenor, operates within the District a surface coal mining operation known as Coal Preparation Facility #25, which is located near the St. Clairs. The Ragland Public Service District has long had problems with its water supply. As early as February 27, 1980, the West Virginia Department of Health (DH)

1/ Mr. St. Clair is the former chairperson of the Public Service District, established by the Mingo County Commission for the purpose of securing and providing safe drinking water for people living in the District. At the time of the events leading up to this case, Ms. Moore was a commissioner of the District, and Mrs. St. Clair was the chairperson of the Ragland Water Board, a local organization with about 150 members.

issued a "Boil Water Order" to Ragland residents. 2/ The Office of Surface Mining Reclamation and Enforcement (OSM) was aware of the problem, having first learned of it as a result of a citizen's complaint filed in 1979. It has since monitored the situation, but its water analyses in 1980 and 1981 indicated that there was no contamination.

In March 1981 OSM became aware that Island Creek was discharging water containing polyacrylamides 3/ into one of three abandoned underground mines which, according to appellants, are connected hydrologically with each other and with the source of Ragland's water supply. Island Creek had a valid water quality permit for the discharge, which had been issued by the West Virginia Department of Natural Resources (DNR), the State regulatory authority. On January 5, 1982, DH issued another order, requiring appellants and other Ragland residents to cease drinking the local water altogether, because its laboratory tests had detected an increased presence of polyacrylamides. The order recited that detectable levels of polyacrylamides could have an adverse health effect. 4/ On February 25, 1982, apparently prompted by the DH notice

2/ Ragland was but one of 23 communities in three West Virginia counties which were subject to the order. The stated reason for the order was "major deficiencies and inadequacies of the subject water systems" discovered after "various investigations" in the affected communities. The order lists eight such deficiencies. Seven can be categorized as essentially procedural. The eighth is "[n]umerous unsatisfactory bacteriological samples" but there is no way to determine whether all eight apply to all communities or, if not, which of the eight apply to Ragland.

3/ Polyacrylamides are used as a settling agent in water. According to the record these polymers are harmless but the monomers, acrylamides, which often occur in association with the polymers, are highly toxic.

4/ This announcement may have been technically incorrect, because polyacrylamides as such are considered harmless; only acrylamides are harmful. However, there is a suspicion that acrylamides regularly occur in association with polyacrylamides.

regarding the presence of polyacrylamides and by a long-held suspicion that the area's water problems were related to Island Creek's operation, appellants filed a citizens' complaint with OSM under the authority of 30 CFR 842.12(a) and 842.11(b). 5/

The complaint alleged (1) that Island Creek's activities had caused and were causing water contamination and (2) that the contamination constituted

5/ On Jan. 21, 1981, the Secretary approved the program submitted by West Virginia in pursuit of the latter's taking primacy in regulating surface coal mining in the State as provided in section 503 of the Surface Coal Mining and Reclamation Act of 1977, 30 U.S.C. § 1253 (Supp. V 1981). That had the effect of changing the character of OSM's role in regulating West Virginia surface coal mines from that of primary regulatory authority to that of oversight authority. The important features of OSM's oversight responsibilities are announced in 30 CFR Parts 733 and 842.

On Feb. 13, 1981, the Circuit Court of Kanawha County, West Virginia, enjoined the operation of the State law implementing the approved program until (with an extension) Feb. 13, 1982. As part of its judgment, the court found that the interim regulations were "presently enforceable and * * * [would] constitute a viable surface mining and reclamation program" which would, at least for the time being, protect the various environmental and business interests identified as affected in the proceeding underlying the injunction.

Section 502(d) of the Act, 30 U.S.C. § 1252(d) (Supp. V 1981), requires operators who wish to conduct surface coal mining operations after 8 months following Secretarial approval of a state program, to submit a permit application within 2 months after that approval. The 2-month application requirement must be met, according to the statute, "regardless of litigation contesting that approval." OSM has taken the position that the litigation provision of section 502(d) was intended to apply only to pending court cases; that is, that the pendency of a suit would have no effect on the 2-month application deadline, but that an injunction or order resolving a dispute (and thus taking the dispute out of the category of pending litigation) could have such an effect. Letter dated Mar. 24, 1981, from Donald R. Tindal, Associate Solicitor, to David C. Callaghan, Director, DNR. (The OSM position is bolstered by two circumstances. First, the Act specifically contemplates that a court may enjoin a state from enforcing its program. See §§ 502(d) and 503(d). Second, the injunction resulted from a suit attacking the West Virginia statute which provided the authority for the state permanent program, not the approval thereof; the named defendant was the Director of DNR, not the Secretary of the Interior.) But for the injunction, permit applications would have been due on Mar. 21, 1981, for operations to be conducted after Sept. 21, 1981. Insofar as the injunction was in effect for a

an imminent threat to the health and safety of the public and a significant imminent environmental harm to water resources. On the basis of the latter allegations, appellants requested an immediate Federal inspection. 6/ In response to the complaint, OSM's State Director on March 3 wrote to DNR to provide the latter with its 10-day notice (see note 6). The letter contains this language: "I have reason to believe that an imminent danger exists in Ragland * * * as a result of the operations at the Island Creek Coal Company preparation plant."

Thereafter, a DNR assistant phoned appellants and informed them that an inspection would take place on March 11, 1982, and that they would be allowed

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fn. 5 (continued)
year and a day, the full run of the 2- and 8-month periods would end Mar. 22, and Sept. 22, 1982, respectively. DNR required an application, in the form of an addendum to earlier applications for operators in a situation like Island Creek's to be filed by Mar. 22, 1982. It also required, as part of its application package, certain hydrological information, which required a 6-month study, to be filed by Sept. 22, 1982. According to Island Creek, it complied with these filing requirements (Reply of Island Creek at 26).

6/ As mentioned in note 5, many of OSM's oversight responsibilities are in 30 CFR Part 842. Under 30 CFR 842.12, a citizen may request OSM to undertake an inspection of an operation covered by a state program. The nature of the inspection is more fully explicated in 30 CFR 842.11 and includes as a purpose for such an inspection the enforcement of requirements or permit conditions not being enforced by the state.

Once a citizen files a request for inspection with OSM, the latter has one responsibility and two avenues of proceeding. The responsibility is to determine whether the allegations supplied by the citizen, if true, constitute a violative condition or imminent danger. If it does so determine, then it must either conduct an immediate inspection or notify the state regulatory authority of the possible violation so that the State may conduct an inspection. The test of whether to inspect or to notify is whether the citizen requesting Federal action "provides adequate proof that an imminent danger to the public health and safety or a significant, imminent environmental harm to land, air or water resources exists and that the state regulatory authority has failed to take appropriate action." 30 CFR 842.11(b)(1)(ii)(C). OSM is also under an obligation to conduct an inspection if, having given the State notice, 10 days elapse and the state has failed to take appropriate action or to inform OSM that it has a valid reason for its inaction.

It is against this regulatory framework and under its authority that appellants filed their request with OSM.

to accompany the inspectors. Appellants asked for and were given permission to bring along two representatives, a former OSM inspector and appellants' attorney. At the appointed place and hour, approximately 25 people were present, including representatives of the United Mine Workers of America, State and county health departments, Mingo County Commission, OSM, Island Creek, and others. There ensued an apparently acrimonious confrontation between appellants, particularly their counsel, and Island Creek officials, followed by what appellants have characterized as merely a tour and not an inspection.

On March 23, 1982, appellants, through counsel, wrote to the OSM Director, recounting the events detailed above and asking for relief. The complaints set out in the letter were as follows:

1. OSM should have conducted an immediate inspection (without 10-days' notice to the State) based on the State Director's belief that an imminent danger existed.

2. DNR forewarned Island Creek of the March 11 "inspection" (logically inferred from the presence of corporate officials), in violation of section 517(b)(3) of the Act and 30 CFR 842.13(a)(1).

3. West Virginia had no regulations governing surface mining at the time of the OSM 10-day letter and at the time of the inspection. Thus the State lacked the authority to handle the citizen complaint.

4. By barring the citizens' representatives from participating in the inspection, OSM and the State deprived the citizens of their right to participate as contemplated in the Act.

5. DNR failed to conduct an adequate and complete inspection by:

a. notifying Island Creek in advance;

b. apparently intending not to conduct an inspection after the initial meeting of the various parties until prodded by the citizens;

c. refusing to allow citizens' representatives to participate;

d. failing to bring along equipment necessary to conduct an investigation and record the results;

e. allowing Island Creek to prohibit the citizens from taking photographs;

f. failing to take water samples or conduct tracing tests;

g. failing to take a sufficiently independent posture vis-a-vis the Island Creek officials, turning the "inspection" into a mere tour.

The relief requested was as follows:

1. OSM should conduct a complete inspection allowing the citizens and/or their representatives to be present and taking certain measures listed in appellants' letter.

2. OSM should cite Island Creek for all observed violations of law and conditions creating an imminent danger or a significant imminent environmental

harm and should impose affirmative obligations designed to correct such violations and conditions. Appellants listed certain suspected violations, including failure to submit a proper permit application.

3. OSM should conduct an investigation into West Virginia's administration of its program. (As noted previously, some of OSM's oversight responsibilities are delineated in 30 CFR Part 733. Under 30 CFR 733.12(a), OSM is to evaluate the administration of each State program at least annually. Under the same section an interested person may request that the Director of OSM undertake such an evaluation.)

On June 8, 1982, OSM replied by letter to the March 23 complaint. The letter informed appellants that OSM had been involved in the Ragland water problem since August 1979 (as mentioned above). The knowledge gained as a result of that involvement caused OSM some concern, so it had offered its help to DH. OSM had also enlisted the Environmental Protection Agency's (EPA's) assistance to further DNR's and DH's efforts. These latter three agencies had agreed among themselves to divide responsibilities for a thorough and ongoing analysis and monitoring of the Ragland water problems. OSM promised continuing efforts to monitor the Ragland situation and to assist DNR where possible, consistent with OSM's oversight role. OSM had also contacted DNR because of the concerns raised in appellants' complaint and had secured DNR's offer to perform a new inspection with appellants present. Thus, OSM represented that it had done everything it reasonably could to resolve the problem, effectively rejecting appellants' claims and requests for relief. OSM denied appellants' request for an evaluation of the State program, because

it did "not believe that such an evaluation would be useful." The letter did not specifically grant the right to appeal to the Office of Hearings and Appeals (OHA).

On July 7, 1982, the citizens filed their notice of appeal with the Interior Board of Surface Mining and Reclamation Appeals (IBSMA). On September 21, IBSMA allowed the intervention of Island Creek. On August 20, 1982, appellants filed their preliminary statement of reasons. Their arguments are as follows:

1. OSM erred in failing to conduct an immediate Federal inspection. (OSM's March 3 letter to DNR citing "imminent danger" was, according to appellants, evidence of a conclusion that warranted a mandatory Federal inspection.)

2. OSM erred in not later conducting an investigation because of the State's failure to respond appropriately within 10 days of the OSM notice. The State's efforts were inadequate, because:

a. DNR gave Island Creek prior notice of the March 11 inspection, Section 517(c);

b. DNR failed to allow appellants' representatives to accompany the inspection;

c. The "inspection" itself was inadequate, because there was:

(i) no camera or inspection equipment;

(ii) no tracing tests;

(iii) no data on Island Creek's use of polyacrylamides collected;

(iv) no data on Island Creek's disposal of other potentially harmful materials;

(v) failure to review Island Creek's permit.

d. OSM had given DNR a second opportunity to inspect after effectively acknowledging that DNR's inspection was inadequate. This was more than 3 months after the 10-day notice.

The relief requested in appellants' preliminary statement is similar to that requested in their complaint to OSM, including ordering OSM to inspect the Island Creek operation and to enforce the Act. Among the suspected violations listed is one challenging permitting requirements of the State program (see note 5).

Other matters raised in the statement are OSM's assertedly unlawful denial of the request for evaluation of the West Virginia program and its failure to meet any of the deadlines for responding to the three requests for administrative review in appellants' March 23 letter. Regarding the denial of the request for review of the State program, appellants note that 30 CFR 733.12(a)(2) requires OSM to verify allegations by a citizen that question the validity of State administration of its program and to determine whether such evaluation should be made. Since OSM made no effort to verify these allegations, the Board should order OSM to do so and to provide a detailed report of its effort and findings.

OSM's response contains some facts not disclosed by appellants. For instance, according to a March 12 letter from DNR to OSM, water samples were

taken during the March 11 inspection. Also, DNR's position was that, given the complexity of the issues, a rapid resolution of the problem was impossible, but "all parties agreed to join in an intensive investigation" to be coordinated through DNR.

The parties participated in an oral argument before IBSMA on November 19, 1982. 7/

Discussion

[1] We must first consider a procedural question. Island Creek has alleged lack of Board jurisdiction because the decision appealed from failed to grant specifically the right of appeal to this Board.

The basis for that objection is the statement of the Board's jurisdiction to decide appeals from decisions by the Director of OSM, found in 43 CFR 4.1281. That section allows appeals from decisions "where the decision specifically grants such right of appeal." As noted previously, the Director's decision of June 8, 1982, did not grant such right.

Appellants contend, however, that relying on only that section of 43 CFR Part 4 to determine this Board's jurisdiction is erroneous. On

7/ Subsequent to this oral argument, the Secretary by Order dated Apr. 26, 1983, transferred all functions and responsibilities delegated to the Board of Surface Mining and Reclamation Appeals to the Board of Land Appeals. 48 FR 22370 (May 18, 1983). Unfortunately, while the hearing was transcribed at the time, it was never typed nor were the tapes retained. Thus, they were not available for consideration by the present panel.

September 15, 1982, 30 CFR 842.15 was amended to include a new subsection (d) with a reference to the jurisdiction section, 43 CFR 4.1281, and a requirement that any decision of the Director on a citizens' complaint under 30 CFR 842.12 contain a statement regarding a right of appeal to OHA. The effective date, being in September, obviously came after the Director's June 8 decision, but an earlier set of circumstances must be taken into account in addressing this issue. In a settlement agreement in March 1980, concluding the dispute in a District of Columbia District Court case, Council of the Southern Mountains, Inc. v. Andrus, CA No. 79-1521, OSM agreed to allow the right of appeal from Director's decisions in citizens' complaint proceedings in accordance with a memorandum issued by the OSM Director to all Regional Directors on February 4, 1980. That memorandum instituted the policy of including the right of appeal language in each informal review decision based on a citizens' complaint. 8/ For these reasons, we conclude that OSM intended that citizens have the right of appeal from decisions on their complaints, and we reject the contention that we lack jurisdiction to review decisions based on citizens' complaints.

There is another area, however, in which our authority to assume jurisdiction is far less clear. As noted, OSM's decision also dealt with the

8/ We are not unmindful that the memorandum referred only to 30 CFR 721.13, the interim program counterpart to 30 CFR 842.15. It is possible, however, to read the memorandum more broadly, given its multiple usage of "citizen complaint" without tying those words specifically to section 721.13. Whatever the proper view of that possibility, the regulatory amendment and the February 1980 memorandum and subsequent court action make manifest the Secretary's intent that all decisions on citizens' complaints be reviewable whether or not they contain the right to appeal and whether the complaint preceding them arose under Part 721 or Part 842. Although it did not sway us in reaching this conclusion, we also note that it was the intervenor and not OSM which objected on this basis; we also raise without deciding, because it is unnecessary, whether any party other than OSM may assert the objection.

(separately stated) request for OSM to evaluate the West Virginia program. The jurisdiction regulation, 43 CFR 4.1281, requires a Director's decision to state the right to appeal as a condition of appealability as much for decisions on State evaluation requests as for decisions on citizens' complaints. Unlike the latter situation, however, there has been for the former neither (1) regulatory change referring to the OHA jurisdiction provision, (2) OSM agreement, approved by a district court, to grant the right of appeals in all cases, nor (3) any other statement of policy which leads us to believe that OSM intended for appellants or others similarly situated to have that right automatically. 9/ Our review, therefore, takes account only of those issues involved in the citizens' complaint. 10/

9/ In addition, we would note that a decision not to evaluate necessarily involves the exercise of a good deal more discretion by OSM than a decision for any kind of action following a citizens' complaint. There are two major reasons for this: (1) an evaluation is likely to require a major Departmental effort to accomplish while an inspection occasioned by a citizens' complaint likely will not, and (2) OSM is required to conduct such an evaluation yearly anyway. Moreover, largely because of the size of the effort necessary, OSM would ordinarily require more than one instance of state deficiencies at one site before it orders an evaluation, especially when the program to be evaluated is less than 5 weeks old at the time, as in this case. Because a request for evaluation might be based on such relatively insubstantial allegations, OSM should have more discretion than in the situation where similar allegations in a citizens' complaint will properly evoke a response, namely an inspection or request for state action, more in line with the nature of the charges. The regulations covering the two types of requests tacitly recognize the distinctions and grant OSM greater discretion in evaluation situations. Section 733.12 of 30 CFR requires only that the Director verify an interested person's allegations and determine whether to evaluate, while 30 CFR 842.12 requires OSM to go to considerable lengths in explaining its actions in response to a citizens' complaint. This is not to suggest that OSM has carte blanche to deny any request for evaluation it receives but rather that it possesses greater latitude in this area than it does in the area of citizens' complaints. That distinction is consistent with requiring the specific grant of a right to appeal from a decision refusing to evaluate before the Board's jurisdiction may be invoked.

10/ In their Mar. 23 letter to the Director requesting informal review of the OSM response to the Feb. 25 citizens' complaint, appellants raised the request for evaluation for the first time, along with certain alleged Island Creek deficiencies, in particular its alleged failure to secure a permanent program

[2] There are two distinct (though interrelated) matters to be discussed in connection with the citizens' complaint under appeal. The first is whether, upon receiving appellants' February 25 letter, OSM should immediately have conducted a Federal inspection. Appellants contend that when, in his letter to DNR asking for State action, the OSM State Director stated that he had reason to believe there was an imminent danger existing at Ragland, he closed the question, having concluded all that was necessary to order a Federal inspection without notifying the state. OSM contends that that language represented an unfortunate choice of words and that it was merely a recitation of the allegations of the complaint. OSM filed an affidavit from the State Director which states that he had no information to corroborate appellants' allegations other than that there were water problems in Ragland, that they were a matter of concern to a number of governmental agencies, and that OSM had no evidence which would establish a connection between the problems and any ongoing mining. The affidavit indicates that the State Director's purpose in the letter was merely to transmit the request to DNR. The tenor of the affidavit is that the State Director felt OSM could do nothing about the situation currently, given the circumstances that it had been aware of the problem for some time, that it had found no connection between the problem and any mining operation, and that it was aware that a number of agencies were then actively seeking a solution.

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fn. 10 (continued)
permit. Insofar as appellants never asked for a Federal inspection in respect to these deficiencies, appellants must have raised them and the state actions in relation thereto not as part of a citizens' complaint but as support for their request for an evaluation of the State program. They, therefore, are among the issues we will not reach for the reasons disclosed in the text. The only issues we will reach are those raised in the Feb. 25 letter and the OSM response to the letter.

We accept OSM's explanation of the "imminent danger" language used in the letter transmitting the complaint to DNR. The State Director's affidavit corroborates what would otherwise be a logical conclusion that the language was merely a recitation (albeit, perhaps an ill-advised one) of the language presented in the complaint. Given the conclusory contents of the complaint and what the State Director already knew about the situation, it would have been highly unlikely for him to conclude that there was an imminent danger; his use of that language, therefore, appears to have been nothing but a statement of the complaint language.

A major factor leading to our conclusion is the deficiency of the complaint itself when measured against the regulatory guidelines concerning what is necessary to trigger an immediate Federal inspection. The regulations require OSM to conduct an immediate Federal inspection when "[t]he person supplying the information provides adequate proof that an imminent danger * * * exists and that the State regulatory authority has failed to take appropriate action." 30 CFR 842.11(b)(1)(ii)(C) (emphasis added). Appellants' February 25 letter cannot be characterized as "providing adequate proof" of the existence of an imminent danger. It simply states appellants' belief that Island Creek's "activities" have contaminated their water and that that contamination has caused an imminent danger. It also states appellants' belief that Island Creek has violated "regulations in the West Virginia permanent program that correspond to 30 CFR 816 and/or 817.41 * * *," without linking that belief to any allegation of imminent danger. The only matter mentioned in the complaint which could possibly be characterized as "proof" is a statement that the DH "has recommended that no one drink or cook with

the water from our water supplies," a fact of which OSM already had knowledge. Thus, the complaint simply does not provide the adequate proof necessary to support appellants' beliefs. In fact, far from providing adequate proof that the State had failed to take appropriate action, the complaint did not even allege such a failure.

The second issue is whether OSM erred in not ordering a Federal inspection after the alleged failure of DNR to take appropriate action in response to the OSM notice. Under 30 CFR 842.11(b)(1)(ii)(B), OSM is required to conduct an inspection if, 10 days after notification to the State, the latter "has failed to take appropriate action to have the [alleged] violation abated and to inform [OSM] that it has taken such action or has a valid reason for its inaction." Since DNR issued no notice of violation during the 10-day period after notification to it, OSM should have ordered an investigation only if DNR failed to inform it of a valid reason for its failure to do so. The time for OSM to make the determination of whether DNR had presented that valid reason was the expiration of the 10-day period. Because the OSM notification to DNR was dated March 3, 1982, that period could not have expired before March 13, 1982. On March 12, 1982, an official of DNR wrote to the State Director in response to the OSM March 3 notice. The letter stated that a "citizens inspection" had taken place on the preceding day, March 11, and that no violations had been observed. It further reported that DH and Water Resources Division representatives had taken water samples at four sites at DNR's request and that, although the samples had not yet been analyzed, DNR expected to furnish OSM with a more complete report in about a week's time. The letter also cited an agreement among the parties (which included OSM, DNR,

DH, Mingo County Commission and Island Creek) to "work in close cooperation with the Ragland Public Service District [represented at the time by Mrs. St. Clair and Mrs. Moore] in order to find potential solutions to the water problems."

OSM also had in its possession memoranda from two of its inspectors, who were present at the March 11 inspection, reporting thereon. One of them is dated March 17 and the other, though apparently undated, is identified by OSM as being dated March 26, 1982. Disregarding whatever oral communications may have taken place between the inspectors and the Director, these reports were apparently not available for consideration at the end of the 10-day notification period but were available by or shortly after the time OSM received appellants' March 23 letter requesting informal review. The thrust of the memoranda was that, although the inspection and the discussion preceding it were not without some snags, the inspection was adequate. An interesting aspect of the March 17 memorandum was its reporting of the contentions of Island Creek at the discussion. The Island Creek representative stated that Island Creek had not begun to use polyacrylamides until 1 month after DH detected them in the water and that Island Creek's water sample analyses had not detected the presence of polyacrylamides (although the DH representative noted that the differing results could be a matter of differences in analysis methodology between Island Creek and DH). This memorandum also reported that when OSM conducted a followup interview with Mrs. St. Clair on March 12, she expressed dissatisfaction with some aspects of the discussion on March 11 but admitted that she was not denied access to any portion of the operation.

As noted, the question presented is whether DNR failed to inform OSM of a valid reason for its failure to take enforcement action. We conclude that DNR did so inform OSM and that the latter's failure, in mid-March 1982, to order a Federal inspection from DNR, given what OSM already knew about the Ragland situation, was enough by itself to assure OSM that the State's response was appropriate. The inspectors' memoranda, though after the fact, supported OSM's conclusion that no Federal inspection was warranted. Appellants' views on the alleged deficiencies in the inspection, as expressed in their March 23 letter, simply were unavailable to OSM when it made its decision, nearly 2 weeks earlier, on whether to order a Federal inspection. All factors considered, we believe that OSM's decision not to order a Federal inspection after the 10-day notice to the State was both rational and appropriate.

The final aspect of the question, therefore, is whether, after receiving appellants' March 23 request for informal review and considering the allegations therein, OSM should have reversed its earlier decision not to inspect. Looking at appellants' allegations of deficiency, we note that all but one were either on disputed matters of law (i.e., whether citizens' representatives should be allowed on inspections) or on matters of fact disputed by other sources of information available to OSM, like the DNR response and the inspectors' memoranda (i.e., the adequacy of the inspection). The only allegation that was not specifically disputed by OSM's other sources was DNR's alleged prenotification to Island Creek personnel of the inspection.

In light of the differing versions of the adequacy of the State response, OSM was certainly justified in proceeding with caution to ascertain the true

state of the facts, rather than rushing into the situation based only on appellants' allegations. OSM's June 8, 1982, decision disclosed a careful consideration of all factors. It recites OSM's considerable earlier involvement in the situation and its later efforts to get EPA involved and to help coordinate the efforts of a number of agencies to resolve the problem. Acknowledging appellants' complaints about the inspection, it details its intercession with DNR to secure a new inspection, despite information in its possession disputing the validity of those complaints. To the extent that the decision conveys OSM's conclusions that the water problem could not at that time be linked to Island Creek's surface coal mining operation and that resolution of the problem would not be furthered by ordering a Federal inspection, we believe that the record fully supports those conclusions.

We agree with the decision's assertion that OSM had done all it reasonably could have to resolve the problem in the circumstances. We refuse to second guess OSM's decision not to inspect when we are aware of its efforts to solve the problem by coordinating several agencies' efforts and by refraining from any action that would have undermined or seriously impeded the coordinated effort then going on.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE ARNESS CONCURRING:

I agree generally with the statement of the pertinent facts of record made by the lead opinion and concur that the result reached by that opinion is correct. I am unable to agree, however, with the reasoning in the opinion, or the dicta, especially the observation that "OSM had done all it reasonably could to resolve the problem." I am unable to agree, also, concerning either the description by the lead opinion of the March 3, 1982, notice to DNR or the conclusion that the notice merely reported to DNR the existence of a citizen's complaint alleging the possible existence of "imminent danger" to Ragland's water supply. Nowhere in the record is there an explanation why the notice from OSM to DNR should be read to state that appellant, and not OSM, found the existence of "imminent danger" in the contaminated water. The March 3, 1982, notice from OSM to West Virginia states, in pertinent part:

> This notification is being provided to you as required by Section 521(a)(1) of P. L. 95-87. I have reason to believe that an imminent danger exists in Ragland, West Virginia as a result of operations at the Island Creek Coal Company preparation plant.
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> * * * * * * *
>
> OSM has previously conducted an investigation of the Ragland situation and a complete copy of our file on the investigation was provided to you last month. However, since that investigation was conducted, new issues have surfaced which led to Mr. St. Clair's allegation of an imminent danger. In accordance with OSM policy, this complaint is being referred to you for action.

There is no apparent ambiguity in the notice. The letter explains, albeit in conclusory terms, the basis for the conclusion reached by OSM that there exists an "imminent danger." "Imminent danger" has been defined as a

condition which creates the possibility of a substantial injury that a rational person, cognizant of the danger, would choose to avoid. Carbon Fuel Co., 3 IBSMA 207, 88 I.D. 660 (1981). While the nature of the "new issues" which are the apparent basis for the agency conclusion that such a condition was to be found in the Ragland water supply are not specified, it is clear that something new, according to the letter of notice, has occurred to make the continuing pollution of Ragland's water merit an inspection of the nearby plant No. 25 of the Island Creek Coal Company. On appeal, OSM has not explained the meaning of the words "new issues" used in the notice. The record concerning this transaction is simply not clear.

On the record presented, the case is similar in effect to that described in Apache Mining Co., 1 IBSMA 14, 85 I.D. 395 (1978), where the Board of Surface Mining and Reclamation Appeals held that, once an appeal is filed, OSM loses authority to take action either to rescind or reconsider a prior action until action is taken on the appeal by the Board. Thus, here, even though OSM would prefer to treat the matter differently now that all the facts have been developed, this desire to reconsider is not enough, by itself, to explain the action taken by the March 3 notice. The explanation by OSM of the meaning of its March 3 notice is a clear illustration of the clarity of hindsight. It need not be otherwise characterized. Even, however, assuming the March 3, 1982, notice did constitute a finding by OSM of imminent danger, the subsequent development of the record fails to establish that the suspicion was founded in fact. In the context of the circumstances of the case, including the initiation of the State program, the transfer of primary responsibility from the Federal program, the implementation of new State regulations and permanent Federal regulations governing the subject of

surface mining, and the history of the lengthy dealings between all the represented parties concerning the Ragland water, the language of the March 3 notice may ultimately be appropriately explained.

On March 11, 1982, as a result of the March 3 notice by OSM to the State, an inspection was held at which appellants were denied the right to take photographs and to be accompanied by their experts. Such an inspection would have been inadequate under the interim regulations governing the Federal program in the initial enforcement of SMCRA by OSM. See Eastover Mining Co., 2 IBSMA 70, 87 I.D. 172 (1980). Those interim regulations were no longer effective on the date of the inspection. Whether another inspection was, or should have been conducted as a result cannot be decided, however, since the record indicates that appellants refused or ignored subsequent State efforts to reinspect. Moreover, reports of State inspections made following the March 11 inspection indicate the activity at plant No. 25 may not be clearly linked to the pollution of the water supply of Ragland.

On the record before the Board, therefore, it is impossible to determine whether the refusal on March 11 to allow inspection as demanded by appellants amounted ultimately to a violation of the State regulations implementing SMCRA. Appellants' refusal to accept as valid later State efforts to reinspect plant No. 25 merely confuses the situation. Since the record indicates that investigation and cooperation between the various agencies concerned is continuing, there seems little point, under the circumstances, to require a Federal inspection now.

Franklin D. Arness
Administrative Judge
Alternate Member

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While in agreement with the result reached by the lead and the concurring opinion, I wish to separately address, in greater detail, two of the issues presented by the instant appeal. The first of these relates to the question of the propriety of the language used by the OSM State Director in his letter of March 3, 1982, to the Director of the West Virginia Department of Natural Resources (DNR). In particular, I wish to focus on the language examined by both opinions at some length, viz., the State Director's declaration that "I have reason to believe that an imminent danger exists in Ragland, West Virginia as a result of operations at the Island Creek Coal Company preparation plant."

Appellants suggest that, having admitted that it had reason to believe that an imminent danger existed, OSM was obliged, under the express terms of section 521(a)(1) of the Act, to conduct its own immediate inspection of the Island Creek Coal Company (Statement of Reasons at 7). Counsel for OSM has responded by attempting to explain away the language of the letter, noting that "this statement was merely a recitation of the allegations Mr. St. Clair made in his February 25 request for an inspection and it was not based on any independent corroboration by OSM" (Answer at 19). The lead opinion characterizes this language as "merely a recitation (albeit, perhaps an ill-advised one) of the language presented in the complaint." The concurring opinion opines that the post facto rationalizations of this language represent "the clarity of hindsight" and expressly rejects the lead opinion's

view that the language was merely a recitation of appellants' complaint arguing that it shows the "conclusion" of OSM that an imminent danger existed. With due respect, I think it clear from a reading of the applicable regulations that all of the above statements are, to a lessor or greater extent, wrong.

It is necessary, here, to pay particular attention to the relevant language of the regulation. Thus, 30 CFR 842.11(b)(1) provides that:

> An authorized representative of the Secretary shall immediately conduct a Federal inspection to enforce any requirement of the Act * * *:
>
> (i) When the authorized representative has reason to believe * * * that there exists any condition, practice or violation which creates an imminent danger to the health or safety of the public * * * and --
>
> (ii)(A) There is no State regulatory authority * * *; or
>
> (B) The authorized representative has notified the State regulatory authority of the possible violation and within 10 days after notification the State regulatory authority has failed to take appropriate action to have the violation abated and to inform the authorized representative that it has taken such action or has a valid reason for its inaction; or
>
> (C) The person supplying the information provides adequate proof that an imminent danger to the public health and safety or a significant, imminent environmental harm to land, air or water resources exists and that the State regulatory authority has failed to take appropriate action. [Emphasis added.]

Under this regulatory scheme, it is clear that as a precondition for a Federal inspection the authorized representative must have "reason to believe" that a violation has occurred. Once this precondition exists, however, a Federal inspection will only occur if one of the three conditions set forth in section 842.11(b)(1)(ii) is met. Thus, contrary to appellants' argument,

the fact that the OSM State Director stated he had "reason to believe" that an imminent danger existed could not, without more, have served as an adequate basis on which to premise a Federal inspection. Not only is there nothing in the letter sent by the OSM State Director which would indicate that any of the three necessary conditions had been met, but also, as the lead opinion demonstrates, there was nothing in appellants' letter to the OSM State Director that would have supported a finding that any of these conditions were present. Appellants' argument is correctly rejected.

This being said, however, both the lead and concurring opinion, as well as the brief filed by OSM, imply that the OSM State Director employed inartful language in notifying DNR of appellants' complaint. I cannot agree. Section 521(a)(1) of SMCRA requires notification of the State regulatory authority where the Secretary (or his authorized representative) "has reason to believe" that any person is in violation of the terms of the Act. Thus, under the statutory mandate, a finding that the authorized representative "has reason to believe" is a required predicate of State notification. It is clearly a term of art. And, more importantly, the applicable regulations make it obvious beyond cavil that, as a matter of law, the OSM State Director did have "reason to believe" that a violation existed. Thus, 30 CFR 842.11(b)(2) provides: "An authorized representative shall have reason to believe that a violation, condition or practice exists if the facts alleged by the informant would, if true, constitute a condition, practice or violation referred to in paragraph (b)(1)(i) of this section." (Emphasis supplied.)

Appellants had alleged that activities of Island Creek Coal Company had resulted in the contamination of the Ragland community water supplies.

If true, this allegation clearly made out a violation of the Act. Therefore, under the regulations, the OSM State Director did, in point of fact, have "reason to believe" that an imminent danger existed. I can discern no basis for questioning the OSM State Director's choice of words in transmitting the complaint to DNR when that choice of words is dictated by the applicable regulations.

Secondly, I think comment is warranted on a number of the deficiencies alleged to have occurred in the State inspection, as well as OSM's response to complaints relating thereto. In this regard, I would note that under 30 CFR 842.11(b)(1)(ii)(B) a Federal inspection would have been required to be undertaken unless the State showed it had a valid reason for its failure to have the violation abated. It is obvious, of course, that the nonexistence of an alleged violation would explain the failure to abate. So, too, would a description of ongoing activities of either an investigative or ameliorative nature. But the correctness of the OSM State Director's decision not to order a Federal inspection under this provision must, in the first instance, be judged on the basis of the information available at the time he makes his decision. The sufficiency of the State inspection on which the State regulatory authority seeks to justify its failure to abate is, thus, a matter of prime significance. I think it is properly subject to examination in the context of this appeal.

I think it is impossible to review the record as it now exists and conclude that an adequate initial inspection was conducted by the West Virginia authorities. It is clear from the record, indeed, no one denies it, that

Island Creek Coal Company was informed in advance that an inspection was to occur. This obviously violates the Act. See section 517(c)(2), 30 U.S.C. § 1267(c)(2) (Supp. V 1981). It is also clear that appellants' attorney was not permitted to participate in the inspection. I think that this was similarly violative of the Act for reasons which I will set forth.

Admittedly, the Act provides only that "[w]hen the Federal inspection results from information provided to the Secretary by any person, the Secretary shall notify such person when the Federal inspection is proposed to be carried out and such person shall be allowed to accompany the inspector during the inspection." Section 521(a)(1), 30 U.S.C. § 1271(a)(1) (Supp. V 1981). This right of inspection, however, clearly applies to State inspections through 30 CFR 840.15. See also 44 FR 15297 (Mar. 13, 1979) (a State program "must provide citizens with the right to request State inspection and to participate in the resulting inspections, at least to the degree provided by Section 521(a)(1) and 30 CFR 842"). The major source of contention is not whether the citizen who made the complaint can accompany a State inspector, but rather whether the citizen can designate a third party to represent him or her for the purposes of inspection.

When appellants' attorney sought to represent them at the inspection, Kensie Jones, President of Island Creek Coal Company, objected. The State inspector acceded to his objections. I believe, given the fact situation disclosed in this record, that it was manifest error to refuse to allow appellants' counsel to participate in the inspection, Jones' objection notwithstanding.

The fact that the statute does not expressly provide that citizen complainants can designate a third party to represent them is not of particular consequence. Where rights are accorded to individuals, it is the general rule that they may be exercised on their behalf by those whom they designate. Exceptions to the general rule are usually premised either on the necessity of limiting participation to specified individuals or on the personalized nature of the right granted. No such limiting intent appears in SMCRA. Indeed, the exact opposite is the case.

In authorizing the filing of citizen complaints, there are no qualifications as to which "citizens" can do so. In fact, the statute actually refers, in this context, to "information from any person" and provides that such person shall "be allowed to accompany the inspector during the inspection." Section 521(a)(1) of SMCRA, 30 U.S.C. § 1271 (1982). In promulgating the interim program regulations, the Department noted, with reference to 30 CFR 721.11(b) which implemented the citizens complaint provisions, that:

> The recommendation was made in one comment to add the words "any person having an interest which is or may be adversely affected" to § 721.11(b). It was suggested that allowing the submission of information by any person would invite submission of frivolous claims. This recommended language was not adopted because the Act and the legislative history are clear that receipt of any information may trigger a Federal inspection in the initial regulatory period, if it provides a reasonable belief that the Act is being violated.

42 FR 62664 (Dec. 13, 1977). In promulgating the regulation involved herein under the permanent program, the Department differentiated between the filing of a citizen's complaint under 30 CFR 842.12(c), and the availability of informal review under 30 CFR 842.15(a), which, in contradistinction to the

virtually unbridled access provided in the complaint process, limited informal review to a complaint "who is or may be adversely affected by a coal exploration or surface coal mining and reclamation operation." 1/ Thus, it is clear beyond peradventure that appellants' counsel would have had standing, in his own right, to initiate a complaint, and would have been entitled to accompany the inspector regardless of Island Creek Coal Company's objections. Anyone in the United States could have done likewise. Considering the broad availability of this right it would stand logic on its head to hold that the right is, nevertheless, so personal that it cannot be exercised through a designated representative.

Parenthetically, I would note that if 500 individuals had signed the complaint I do not doubt that Island Creek Coal Company would argue that the complaints were required to select a representative, rather than permit all 500 to trudge their way through. This merely underlines the point that the language of the statute and regulations are subject to the rule of reason. I believe that not only may complaints designate a representative, at times they might properly be required to do so.

As I noted above, the correctness of a decision of the OSM State Director not to order a Federal inspection must initially be judged based on the information which the State Director had available to him on the running

1/ This is consistent with the traditional approval which this Board has taken in matters relating to protests filed with the Bureau of Land Management (BLM). Thus, under 43 CFR 4.450-2 any person may file a protest of an action proposed to be taken by BLM. However, only a person adversely affected from denial of the protest has standing to appeal to this Board under 43 CFR 4.410. See United States v. United States Pumice Corp., 37 IBLA 153, 158-59 (1978).

of the initial 10 days, since, by statute and regulation, unless the State regulatory agency justified its failure to abate the alleged violation by that time, OSM would be required to conduct a Federal inspection. By letter of March 12, 1983, DNR informed the OSM State Director that an inspection had occurred with two of the complainants participating, that four water samples had been taken, and noted that all parties had agreed to participate in an intensive investigation which would be coordinated through DNR. I have no difficulty agreeing with the thrust of the lead opinion that, based on this letter, the OSM State Director had more than an adequate basis for concluding that the State regulatory agency had justified its failure to abate the alleged violation.

This cannot end the matter, however. It is clear that the oversight responsibility, and the possibility that a Federal inspection must be ordered, continues beyond the 10-day period. Thus, for example, if appellants had subsequently informed the OSM State Director that, in fact, no inspection had taken place, no samples were taken, and the complainants were actually barred from any participation, in short, that every factual allegation of the State regulatory agency was false, clearly the State Director would not be foreclosed from reconsidering his prior decision that the State regulatory agency had justified its failure to abate.

In any event, even if the refusal by the OSM State Director to order a Federal inspection is judged solely on the basis of the information available to him during the 10-day period after his notification of the filing of the citizens' complaint is received by the State regulatory agency, where the

complainants seek informal review pursuant to 30 CFR 842.15(a), the correctness of the State Director's decision must be judged by all information available at that time. See generally In re Lick Gulch Timber Sale, 72 IBLA 261, 273 n.6, 90 I.D. 189, 196 n.6 (1983). By the time OSM Director Harris issued his decision denying review on June 8, 1982, the record was replete with examples supportive of appellants' allegation that the inspection was inadequate.

First of all, by memorandum of March 17, 1983, the OSM State Director was informed not only that appellants' attorney had been refused permission to participate in the inspection, but also that two separate inspections, one of which had no citizen participation, had actually been conducted. It was on this latter inspection that the water samples were taken, and it seems clear that the complainants were not even aware of this inspection since they alleged in their application for informal review that no samples were taken. This information raised serious questions concerning the sufficiency of the State regulatory agency's response.

In addition, the April 6, 1982, letter from DNR to the State Director clearly should have alerted the OSM Director to major problems in the West Virginia approach to citizens' complaints. Indeed, it is difficult to read the DNR response without coming to the conclusion that the State officials felt little obligation to support the citizen complaint process mandated by SMCRA. The following statements are symptomatic of the approach taken by DNR:

> (2) Allegation: DNR refused to permit Mr. Mark Squillace, Mr. Don Steck, and Mr. Ken Mills, official representatives of the

> Ragland PSD the right to speak, question or comment about the inspection and/or investigation. In addition they were refused the right to accompany the inspection and/or investigation team.
>
> FACT: The abovementioned individuals were allowed comment and questions during the meeting phase. Again public record supports this fact.
>
> These individuals were not allowed to participate in the inspection nor was there any official documentation as to their capacity relative to the Ragland PSD. [T]his department had no obligation to allow them to participate in the inspection.
>
> * * * * * * *
>
> (7) Allegation: DNR appeared to be taking a guided tour of the facility instead of inspecting and/or investigating the charges.
>
> FACT: Those citizens involved were escorted to those facilities which they specifically requested to inspect.
>
> Upon completion of the inspection, Ms. Moore and Ms. St. Clair were asked if they had any other specific areas they might want to inspect. Having none, the inspection was concluded.

I have already discussed my views on the representation issue. I do, however, wish to expressly note that it was DNR's obligation to inspect and that the complainants had absolutely no obligation to point out areas to be inspected. They are given the right to accompany DNR on its inspection. The entire tenor of this response is indicative of a misapprehension on the part of DNR as to its obligations. 2/ It is clear that appellants are essentially correct in their assertion that they were given a tour rather than an inspection, particularly as there was another "real" inspection simultaneously occurring of which they were given no notice.

2/ I would hope that the glaring shortcomings were the result of West Virginia's inexperience in working with the mandated procedure rather than an indication of its ultimate approach.

The Director, OSM, should have made reference to these deficiencies. I think this is particularly true where the essential predicate of the denial of relief is based on the failure of appellants to avail themselves of another opportunity for inspection. Without guidance as to what that inspection should entail, such a reinspection would have, no doubt, exhibited the same defects manifest in the original.

Nevertheless, I am constrained to concur with the majority disposition. The record before the Board is now replete with accounts of the various activities of State and Federal agencies attempting to ascertain the cause of Ragland's water problems. I fail to see how ordering a Federal inspection would advance resolution of this problem. I would hope, however, that we are not faced with a similar record in the future when called upon to review a citizens' complaint.

James L. Burski
Administrative Judge